

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:)	
)	CA No. 07-10248-PBS
PHARMACEUTICAL INDUSTRY AVERAGE)	CA No. 06-11337-PBS
WHOLESALE PRICE LITIGATION)	CA No. 05-11084-PBS
)	Pages 1-47

STATUS CONFERENCE

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts
November 13, 2008, 3:45 p.m.

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OFFICIAL COURT REPORTER
United States District Court
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<p style="text-align: right;">2</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 FOR THE PLAINTIFFS:</p> <p>4 GEJAA T. GOBENA, ESQ. and JUSTIN DRAYCOTT, ESQ.,</p> <p>5 United States Department of Justice, Civil Division,</p> <p>6 P.O. Box 261, Ben Franklin Station, Washington, D.C., 20044,</p> <p>7 for the United States of America.</p> <p>8 GEORGE B. HENDERSON, ESQ. and BARBARA HEALY SMITH,</p> <p>9 ESQ., United States Attorney's Office, United States</p> <p>10 Courthouse, 1 Courthouse Way, Suite 9200, Boston,</p> <p>11 Massachusetts, 02210, for the United States of America.</p> <p>12 JAMES JOSEPH BREEN, ESQ., The Breen Law Firm,</p> <p>13 5755 North Point Parkway, Suite 39, Alpharetta, Georgia,</p> <p>14 30022, for the Relator, Ven-A-Care of the Florida Keys, Inc.</p> <p>15 FOR THE DEFENDANTS:</p> <p>16 NEIL MERKL, ESQ., Kelley Drye & Warren, LLP,</p> <p>17 101 Park Avenue, New York, New York, 10178k,</p> <p>18 for Dey, Inc.</p> <p>19 JOHN W. REALE, ESQ., Kirkland & Ellis, LLP,</p> <p>20 200 East Randolph Drive, Chicago, Illinois, 60601,</p> <p>21 for Boehringer Ingelheim Corporation, et al.</p> <p>22 JAMES R. DALY, ESQ., Jones Day,</p> <p>23 77 West Wacker, Chicago, Illinois, 60601-1692,</p> <p>24 for Abbott Laboratories.</p> <p>25</p>	<p style="text-align: right;">4</p> <p>1 office, but it all gets intermingled with other cases. I</p> <p>2 want to make sure I didn't miss anything.</p> <p>3 And, by the way, did you all notice we have now</p> <p>4 deconstructed our docket, so hopefully we can follow the</p> <p>5 case more easily with respect to the subcategories. If</p> <p>6 anyone has confusion about that, please ask Mr. Alba because</p> <p>7 it should be a lot easier now to follow what's happening in</p> <p>8 these cases as opposed to the New York cases and the</p> <p>9 California cases and the like, so we're going to do that.</p> <p>10 Now, this is, as far as I'm concerned, unless you</p> <p>11 think otherwise, only the Ven-A-Care cases. Is that right?</p> <p>12 MR. HENDERSON: Correct, your Honor.</p> <p>13 THE COURT: Because I received some notice coming</p> <p>14 in from New York telling me that they don't plan on</p> <p>15 attending, and inasmuch as I'd love to see them, I wasn't</p> <p>16 planning on them attending. Is there anyone here from</p> <p>17 another case that didn't understand that?</p> <p>18 Okay, just on the Ven-A-Care cases, what is it</p> <p>19 that I need to resolve?</p> <p>20 MR. HENDERSON: Your Honor, as I understand it,</p> <p>21 the defendants are essentially seeking an extension of the</p> <p>22 discovery schedule and at least for seven states which are</p> <p>23 in litigation in which they have just issued notices for the</p> <p>24 last -- I'm sorry, five states, I think, which are in</p> <p>25 litigation. Is it five or seven? Seven, seven states.</p>
<p style="text-align: right;">3</p> <p>1 PROCEEDINGS</p> <p>2 THE CLERK: In re: Pharmaceutical Industry</p> <p>3 Average Wholesale Price Litigation, Civil Action</p> <p>4 Nos. 07-10248, 06-11337, and 05-11084, will now be heard</p> <p>5 before this Court. Will counsel please identify themselves</p> <p>6 for the record.</p> <p>7 MR. HENDERSON: George Henderson for the United</p> <p>8 States, your Honor.</p> <p>9 MS. SMITH: Barbara Healy Smith, also for the</p> <p>10 United States.</p> <p>11 MR. GOBENA: Gejaa Gobena on behalf of the United</p> <p>12 States.</p> <p>13 MR. BREEN: Jim Breen on behalf of the relator,</p> <p>14 Ven-A-Care of the Florida Keys.</p> <p>15 MR. MERKL: Neil Merkl on behalf of defendant Dey.</p> <p>16 MR. REALE: John Reale on behalf of the Boehringer</p> <p>17 defendants.</p> <p>18 MR. DALY: Good afternoon, Judge. Jim Daly on</p> <p>19 behalf of Abbott Labs.</p> <p>20 THE COURT: Great. Today is a status conference,</p> <p>21 and I at least received a few things from the defendants.</p> <p>22 I'm not sure, did I receive anything from you?</p> <p>23 MR. HENDERSON: No, your Honor.</p> <p>24 THE COURT: All right, I always want to check</p> <p>25 because it's such a messy docket, no fault of our Clerk's</p>	<p style="text-align: right;">5</p> <p>1 THE COURT: Right now the discovery cutoff is</p> <p>2 December 15. Is that correct?</p> <p>3 MR. HENDERSON: That's correct. The defendants</p> <p>4 have announced that -- they've requested us to agree to an</p> <p>5 extension of the discovery schedule for at least these seven</p> <p>6 states that are in litigation elsewhere, and they would like</p> <p>7 to be able to essentially have our discovery take place</p> <p>8 according to the litigation schedules of those seven other</p> <p>9 jurisdictions, which --</p> <p>10 THE COURT: Short of that, though, do you have the</p> <p>11 other depositions scheduled?</p> <p>12 MR. MERKL: Yes, your Honor.</p> <p>13 THE COURT: I'm not inclined to wait. I'm very</p> <p>14 eager. This was an agreed-upon schedule. I, of course,</p> <p>15 would extend a schedule if somebody got sick or, you know,</p> <p>16 something happens to you personally, but I don't want to</p> <p>17 wait for the schedules in the other states.</p> <p>18 MR. MERKL: Your Honor, we've basically completed</p> <p>19 twenty-two states, okay? That leaves twenty-nine that we</p> <p>20 need to do. Twenty-one of those states we have issued, in</p> <p>21 accordance with the procedure we discussed with your Honor,</p> <p>22 the 30(b)(6) and in some cases the 30(b)(1) and the document</p> <p>23 subpoenas. We have dates for those or most of those before</p> <p>24 the 15th.</p> <p>25 THE COURT: Okay.</p>

<p style="text-align: right;">6</p> <p>1 MR. MERKL: What we'd like is, could we extend</p> <p>2 that time 60 days?</p> <p>3 What Mr. Henderson was referring to was a separate</p> <p>4 proposal I made, which is, there are seven states where the</p> <p>5 discovery in those states -- those are litigating states --</p> <p>6 is actively going on or about to start. We felt that rather</p> <p>7 than dropping our own 30(b)(6) notice and our own document</p> <p>8 demand in the middle of those proceedings, that could we</p> <p>9 work with them and cross-notice --</p> <p>10 THE COURT: You know what, let me just say,</p> <p>11 normally I would say "Yes, sure," but I'm not willing to</p> <p>12 wait the time that it would take. It puts us too far behind</p> <p>13 the eight ball.</p> <p>14 MR. MERKL: Well, the understanding would be, your</p> <p>15 Honor, on those seven states is that what we were proposing</p> <p>16 there was that would not affect things like experts and</p> <p>17 summary judgment. It would just --</p> <p>18 THE COURT: Well, how could it not? I mean, take</p> <p>19 Massachusetts, which is the one that I've now got my sleeves</p> <p>20 rolled up on. It's a mess understanding what happened to</p> <p>21 that Medicaid program. It changed from year to year; there</p> <p>22 were different policies at different points. You've got to</p> <p>23 do discovery state by state, as far as I can tell. And it</p> <p>24 matters. It matters to, you know, issues like causation.</p> <p>25 If in fact you're going to litigate all these states and</p>	<p style="text-align: right;">8</p> <p>1 being heavily litigated? Is that it?</p> <p>2 MR. MERKL: Well, there's seven that are being</p> <p>3 heavily litigated, twenty-one that are less so. But we have</p> <p>4 actually everything noticed, and it's going to be this mad</p> <p>5 dash --</p> <p>6 THE COURT: Excuse me. What are the ones that are</p> <p>7 currently under litigation in these other states?</p> <p>8 MR. MERKL: The seven states that I was referring</p> <p>9 to are Idaho, Mississippi, New York, Utah, South Carolina,</p> <p>10 Pennsylvania, Iowa.</p> <p>11 MR. HENDERSON: And Kansas has just filed suit.</p> <p>12 MR. MERKL: Well, Kansas we would propose to do</p> <p>13 with the standard 30(b)(6) approach by December 15 because</p> <p>14 it has to start --</p> <p>15 THE COURT: So with the exception of these, can't</p> <p>16 we -- listen, I view this as potentially overwhelming to do</p> <p>17 the summary judgment in all the states anyway. What if we</p> <p>18 were just to let these go their normal -- let them pick up</p> <p>19 discovery in these other cases but keep to December 15 for</p> <p>20 every other state?</p> <p>21 MR. MERKL: Yes.</p> <p>22 THE COURT: And not put off, not put off anything</p> <p>23 by 60 days, not put off -- do summary judgment on the</p> <p>24 other --</p> <p>25 MR. MERKL: Forty-one.</p>
<p style="text-align: right;">7</p> <p>1 you're going to defend all these states, each state has its</p> <p>2 own story, doesn't it, for Medicaid? Are you finding that?</p> <p>3 MR. MERKL: Yes, your Honor, and I guess the</p> <p>4 reason we were proposing carving those out, realizing that</p> <p>5 you prefer not to do that now, was just to hope to take</p> <p>6 advantage of that massive ongoing discovery that other</p> <p>7 parties are already doing so that we could focus this. If</p> <p>8 that's not workable, I guess we'd still like an extra</p> <p>9 60 days to try and get it all done.</p> <p>10 THE COURT: Well, let me just ask you this. Let</p> <p>11 me just back up. Understanding that every single state</p> <p>12 might have a different story, by December 15, how many</p> <p>13 states will we be done with without those that are heavily</p> <p>14 litigating?</p> <p>15 MR. HENDERSON: Your Honor, if I might say so, we</p> <p>16 don't need to do discovery in all of the states in order to</p> <p>17 establish what their Medicaid reimbursement formulas have</p> <p>18 been over time. Those changes are established as a matter</p> <p>19 of law in state plan amendments. Ninety-nine percent of the</p> <p>20 discovery of states that has been going on has been</p> <p>21 "the government knowledge" defense, and the reason --</p> <p>22 THE COURT: All right, that may be true too. My</p> <p>23 point is, what if we did this? I'm not inclined to extend</p> <p>24 the schedule. This case is taking too long. It's going</p> <p>25 forever. But what if -- what is it, seven states that are</p>	<p style="text-align: right;">9</p> <p>1 THE COURT: -- forty-three or whatever -- I don't</p> <p>2 know how many states we're talking about -- states. In</p> <p>3 other words, keep completely on the schedule. You finish --</p> <p>4 I'm not going to extend the December 15. This is just</p> <p>5 getting too far beyond, and everyone agreed to the schedule,</p> <p>6 but we basically carve off these states because we're going</p> <p>7 to have plenty on our plate.</p> <p>8 MR. HENDERSON: Your Honor, I don't think -- I</p> <p>9 mean, as far as we're concerned, those seven states, they've</p> <p>10 just been noticed too late. And I will report to the Court</p> <p>11 that we've been in touch with counsel for those litigating</p> <p>12 states, except for South Carolina which we haven't really</p> <p>13 conferred with. All of them oppose this --</p> <p>14 THE COURT: Are you moving for summary judgment,</p> <p>15 or are you? Everybody is, right?</p> <p>16 MR. MERKL: Everybody is, your Honor.</p> <p>17 MR. HENDERSON: Yeah, I'm not sure we're going to</p> <p>18 be moving for summary judgment on all issues for all states.</p> <p>19 THE COURT: I don't know. I think what's going to</p> <p>20 happen is going to be overwhelming to me. And short of the</p> <p>21 First Circuit just dramatically changing the territory, I</p> <p>22 think it is going to crush my session -- I'm just putting it</p> <p>23 out there, all right? -- to try and figure out, you know,</p> <p>24 forty-three, forty-one states. I think I'll have plenty to</p> <p>25 do. So I think what makes sense is, why don't we -- I'm not</p>

<p style="text-align: right;">10</p> <p>1 going to extend the schedule. We are going to keep to this</p> <p>2 schedule. If these states can do -- rather than kill you</p> <p>3 over Thanksgiving and Christmas to try and put all these in,</p> <p>4 it is cost-effective to piggyback on what's happening with</p> <p>5 these other states, and in the meantime, put all the other</p> <p>6 states on the schedule we agreed to.</p> <p>7 MR. HENDERSON: The difficulty with that, your</p> <p>8 Honor, is then we don't know what the schedules of those</p> <p>9 other states are, and we're essentially putting off</p> <p>10 discovery indefinitely.</p> <p>11 THE COURT: Well, that's why I'm for sure not</p> <p>12 putting off the whole of Florida. If at some point when</p> <p>13 we're much closer, if it looks like they are lost in</p> <p>14 Never-Never-Land, then tell me that that's impossible. But</p> <p>15 I just don't see how -- I've watched Mylan I'm working</p> <p>16 through, okay, and it is unbelievably fact-intensive and</p> <p>17 difficult to go through what the Medicaid policies are. It</p> <p>18 is not just a question of law. It's who knew what, how did</p> <p>19 it happen, when did the policies change? It's hard, it's</p> <p>20 really hard, and we're working through that right now. So</p> <p>21 if there are other states that look like that, that's going</p> <p>22 to be -- it's going to be state by state: What did they</p> <p>23 know, when did they know it, what was the statutory scheme?</p> <p>24 And so I think I'll have plenty to do and so will you. I</p> <p>25 don't think you'll be wanting for things to do.</p>	<p style="text-align: right;">12</p> <p>1 starting and they stored all their documents and kept all</p> <p>2 their documents. It's not. Some of them are starting from</p> <p>3 the get-go, and it's a struggle getting them to turn the</p> <p>4 stuff around quickly.</p> <p>5 THE COURT: That's your fault for waiting so long.</p> <p>6 Basically we all agreed with the schedule. I think it</p> <p>7 was -- I went back to look. It says joint, joint.</p> <p>8 MR. MERKL: Yes, your Honor, yes.</p> <p>9 THE COURT: All right, so understand, I'm not here</p> <p>10 to make people spend a fortune. If someone else is going to</p> <p>11 do Utah, all power to them. I mean, we'll see about that</p> <p>12 later. But I think we can move this case, we can start</p> <p>13 working it through and just getting it going on the other</p> <p>14 states. You agreed; you're stuck with it. If you don't get</p> <p>15 your documents, as far as I'm concerned, I'm sorry, but you</p> <p>16 took too long to start it going. So, you know, it's got to</p> <p>17 be reasonable. They'll do what they reasonably can do, and</p> <p>18 that's what we'll do.</p> <p>19 Now, that having been said, now I -- I think</p> <p>20 that's it for that issue, right?</p> <p>21 MR. MERKL: Well, Medicaid, yes, your Honor, on</p> <p>22 the discovery. There's some other pending discovery</p> <p>23 motions.</p> <p>24 THE COURT: Yes, I think there are. Now, I called</p> <p>25 Judge Bowler this morning, and I'm trying to figure out what</p>
<p style="text-align: right;">11</p> <p>1 MR. HENDERSON: I might want a vacation, your</p> <p>2 Honor, at the end of it all.</p> <p>3 THE COURT: You get Thanksgiving and Christmas.</p> <p>4 And so I'm not putting this off. We are kick-starting this.</p> <p>5 We need this to happen. And so I don't think it's so</p> <p>6 terrible if we do forty-one or forty-three states rather</p> <p>7 than fifty; and the truth is, if I start ruling your way on</p> <p>8 a bunch of these, it may refine our knowledge with respect</p> <p>9 to the others and then vice versa as well.</p> <p>10 MR. MERKL: I understand you to mean rule in my</p> <p>11 way?</p> <p>12 THE COURT: Yes, either way. I mean, it will</p> <p>13 start focusing people on the summary judgment. So as I'm</p> <p>14 hearing it, everything was going to be done except for these</p> <p>15 states, right?</p> <p>16 MR. MERKL: Yes. Well, everything is noticed, but</p> <p>17 the problem --</p> <p>18 THE COURT: Then you're going to have to live with</p> <p>19 it. You agreed to that schedule; live with it.</p> <p>20 MR. MERKL: Can I just point out one thing that's</p> <p>21 happening with the states?</p> <p>22 THE COURT: Yes.</p> <p>23 MR. MERKL: The starting point, of course, is the</p> <p>24 documents. What we're finding with the states is, it's not</p> <p>25 as though they got the memo five years ago that these were</p>	<p style="text-align: right;">13</p> <p>1 the status was, and do you have a bunch of -- do you have</p> <p>2 any -- various motions for protective order have been filed,</p> <p>3 is that it? Have they been opposed? What's the status of</p> <p>4 all that?</p> <p>5 MR. HENDERSON: I can't -- there are a bunch of --</p> <p>6 the defendants have a bunch of motions, pending motions that</p> <p>7 have been fully briefed to compel. We, I think, just filed</p> <p>8 a motion for protective order. In the Roxane case, we only</p> <p>9 just on Monday got delivered two hard drives and four CDs of</p> <p>10 materials that have been requested way back in 2007, and we</p> <p>11 just got them now. So there are going to be issues like</p> <p>12 this that probably have to be dealt with on a case-by-case</p> <p>13 basis on separate motions. The defendants have some motions</p> <p>14 to compel. We may have some.</p> <p>15 THE COURT: Does that affect these joint</p> <p>16 scheduling orders? Were these produced too late? Or is</p> <p>17 this just a question of -- does it affect depositions or</p> <p>18 anything that you just got these documents?</p> <p>19 MR. HENDERSON: It may. We have to look at them</p> <p>20 and see whether -- right now in the Roxane case, for</p> <p>21 example, that's the main one, from our perspective, where</p> <p>22 we're just in the process of noticing five depositions of</p> <p>23 current or former employees.</p> <p>24 THE COURT: Why did it take so long to get to</p> <p>25 them?</p>

<p style="text-align: right;">14</p> <p>1 MR. HENDERSON: To the documents?</p> <p>2 THE COURT: Yes.</p> <p>3 MR. REALE: Your Honor, I'm not familiar with the</p> <p>4 intricacies of this. I don't know that he's necessarily</p> <p>5 giving you the full story.</p> <p>6 THE COURT: This is a joint scheduling order,</p> <p>7 joint, agreed upon, so how are they --</p> <p>8 MR. REALE: Your Honor, we were just compelled to</p> <p>9 produce some documents, and I know that --</p> <p>10 THE COURT: Well, all right, that's different, but</p> <p>11 did you do a basic document production long before now?</p> <p>12 MR. REALE: Yes, your Honor.</p> <p>13 MR. HENDERSON: They provided to us, your Honor,</p> <p>14 what they had produced in other litigation without</p> <p>15 undertaking any independent search for the documents that we</p> <p>16 requested, and it took a long time until we -- it took a</p> <p>17 while. We finally moved to compel. We haven't even gotten</p> <p>18 the information, for example, the e-mails that Judge --</p> <p>19 THE COURT: When is the Roxane deposition</p> <p>20 scheduled for?</p> <p>21 MR. HENDERSON: Between now and December 15.</p> <p>22 We're still working with counsel to set these dates.</p> <p>23 THE COURT: But what's pending in front of</p> <p>24 Judge Bowler? Is there anything pending?</p> <p>25 MR. HENDERSON: Right now there's just one</p>	<p style="text-align: right;">16</p> <p>1 THE COURT: But some of them weren't even</p> <p>2 protected. They were cover memos. Some of them were</p> <p>3 factual recitations or they were post-policy. I mean, it</p> <p>4 wasn't even protected. Some of it was core, as you would</p> <p>5 say, but some of it wasn't even subject to it, and I don't</p> <p>6 know what to do with that. You know, there were cover</p> <p>7 memos. I didn't understand why they were being -- there</p> <p>8 were ones that were from outside the agency, I forget, some</p> <p>9 carrier. They weren't even protected.</p> <p>10 So I don't know what to do. I think a master</p> <p>11 makes sense. I can't possibly do it myself, I can't. It</p> <p>12 took me personally -- I didn't send it to a magistrate</p> <p>13 judge. I didn't give it to a law clerk. I sat and read</p> <p>14 them and balanced, and I can't possibly do it for the volume</p> <p>15 of documents we're talking about.</p> <p>16 MR. HENDERSON: What I recommend, your Honor,</p> <p>17 since we haven't filed an opposition to the motion, that we</p> <p>18 be permitted to file an opposition to that particular</p> <p>19 motion. And I think it's probably inevitable that some of</p> <p>20 these motions, whether it's the defense motions or a motion</p> <p>21 that we make, may require in individual circumstances for</p> <p>22 some particular depositions that we're going to go beyond</p> <p>23 the December 15 deadline, just because it takes that time</p> <p>24 for a motion to be heard and decided.</p> <p>25 THE COURT: I'm not extending the deadline short</p>
<p style="text-align: right;">15</p> <p>1 deposition in the Dey case that we want to take a deposition</p> <p>2 of a former employee who happens to be in prison, so we have</p> <p>3 to go -- we are required under the rule -- long story, your</p> <p>4 Honor, nothing to do with their Dey employment. It's post-</p> <p>5 employment conduct. But, in any event, the rules require</p> <p>6 that we file a motion to take a deposition.</p> <p>7 THE COURT: So I suggest you try and schedule a</p> <p>8 hearing before Judge Bowler, like, soon. I was trying to</p> <p>9 look on the docket. I saw some of your motions, your</p> <p>10 motions, like, on deliberative process privilege? I think</p> <p>11 you're being -- it took me -- I know we're going to get</p> <p>12 there -- it took me forever. I feel sorry for whoever you</p> <p>13 entrusted this task with, but it took me forever to go</p> <p>14 through the twelve documents because it's not all or</p> <p>15 nothing, you know. I mean, when you go through them, some</p> <p>16 of it's protected, some of it's not, some of it I'd have to</p> <p>17 balance. It takes forever, and I can guarantee you I am not</p> <p>18 going to sit -- or I just talked to Judge Bowler. She said</p> <p>19 it would be impossible for her to go through. I think you</p> <p>20 were overprotective of the deliberative -- I mean, I</p> <p>21 understand the institutional pressures that make you do</p> <p>22 that. It was overprotective. And most of these were old</p> <p>23 documents. It was just unnecessary.</p> <p>24 MR. HENDERSON: Your Honor, we followed your</p> <p>25 instructions to the T in that regard.</p>	<p style="text-align: right;">17</p> <p>1 of family illness or personal illness. I mean, something</p> <p>2 that's human, of course I'm going to do that.</p> <p>3 MR. HENDERSON: Well, we're not suggesting that.</p> <p>4 We're just saying that in order to resolve a motion -- I</p> <p>5 don't think all of these motions are going to be decided in</p> <p>6 time to get these depositions done by the 15th.</p> <p>7 THE COURT: Well, it might be that Judge Bowler</p> <p>8 decides it after, but I think I would go in there with all</p> <p>9 the information and try and schedule them. I mean, I don't</p> <p>10 know why this is all coming up at the last minute, but I</p> <p>11 know just as a practical matter that's what happens in</p> <p>12 litigation, but I am not generally reopening it.</p> <p>13 And so the big issue really is for me, on the</p> <p>14 deliberative process privilege, many of these were old</p> <p>15 documents. Many of them were uncontroversial. I just</p> <p>16 couldn't even understand why it was worth the dime not to</p> <p>17 disclose them, even if there was argument for it. There</p> <p>18 were a couple where it was really heartland, you know, "This</p> <p>19 is what I think, and this is what you think." You know,</p> <p>20 what you think about is deliberative of what a jury might</p> <p>21 do, but most of it wasn't. You've seen it now.</p> <p>22 MR. REALE: No, your Honor, we haven't.</p> <p>23 THE COURT: Why?</p> <p>24 MR. REALE: They haven't produced it to us yet.</p> <p>25 MR. DALY: Mr. Draycott tells me that we'll have</p>

<p style="text-align: right;">18</p> <p>1 them tomorrow, but we don't have them yet, Judge.</p> <p>2 THE COURT: So any carrier documents shouldn't be.</p> <p>3 Any cover memos shouldn't be. Any factual recitations</p> <p>4 shouldn't be. Any drafts can be withheld, and anything</p> <p>5 that's what you referred to in the memo occasionally as</p> <p>6 "core" deliberative, like core, the back-and-forth before a</p> <p>7 policy, arguably. But the older it is, the less important</p> <p>8 this thing is. And anything post-2003 you don't need to put</p> <p>9 in unless it's referencing backwards; you know, "As we knew</p> <p>10 back then, we knew that these inhalers were --" But that</p> <p>11 doesn't need to come in. A, it's probably not relevant,</p> <p>12 and, B, it's -- so the weighing would be different. But I</p> <p>13 don't -- how many of these documents did you say were now</p> <p>14 subject to this privilege?</p> <p>15 MR. DALY: Judge, there's the eight that you</p> <p>16 ordered produced. There's forty-two that have been</p> <p>17 previously submitted to Judge Bowler that she has yet to</p> <p>18 rule on. I think she may have been waiting on your Honor's</p> <p>19 ruling. But there were two in camera submissions to her,</p> <p>20 one December, '07, one in June of this year, forty-two</p> <p>21 there. And then, as I put in our motion, Judge, based on</p> <p>22 your ruling, it appears that a variety of documents that</p> <p>23 should have been submitted were not. And there's no way in</p> <p>24 the world I'd want your Honor -- I would suggest your Honor</p> <p>25 do this. That's why I think we should appoint a special</p>	<p style="text-align: right;">20</p> <p>1 but I can't prevent them from seeing what's there in order</p> <p>2 to mount the defense. And if I ever reject it, it goes up</p> <p>3 on appeal. So that's the issue. You want me to prejudge</p> <p>4 the defense, and I'm not willing to do that. I don't</p> <p>5 disagree with you that a lot of it doesn't support their</p> <p>6 theory, but they can't know that.</p> <p>7 MR. DRAYCOTT: Your Honor, there were a lot of</p> <p>8 issues raised and a lot said in the motion that was just</p> <p>9 filed, and I think that this is an area where a couple of</p> <p>10 things: We would be well advised to listen and to reflect</p> <p>11 on everything that your Honor said today, and I think that</p> <p>12 we listened very carefully to what your Honor said on</p> <p>13 July 24, and we devoted an enormous amount of resources in</p> <p>14 trying to comply with that. So I would again implore you</p> <p>15 for an opportunity to respond. And we will also, while</p> <p>16 we're responding to the motion that was filed yesterday, we</p> <p>17 will consider all the points that your Honor has made.</p> <p>18 Your Honor has also, I think, said some things</p> <p>19 that were both helpful and, you know, caused more work for</p> <p>20 us. We'll consider all of that. We'll look anew at the</p> <p>21 privilege assertions that we've made, and we'll be doing</p> <p>22 that while we're also at the same time responding to the</p> <p>23 motion, but if we can both try to respond to your Honor's</p> <p>24 comments in a constructive way but at the same time also</p> <p>25 address the request for a special master that has been made.</p>
<p style="text-align: right;">19</p> <p>1 master and get it over with.</p> <p>2 THE COURT: Why don't you talk about who might be</p> <p>3 a special master. And let me just say this: I know this</p> <p>4 poor guy asked for additional time who was doing it</p> <p>5 initially. It must have taken him longer than -- what was</p> <p>6 his name again? I am so sorry because it's really brutal.</p> <p>7 And maybe you didn't want to do it page by page and</p> <p>8 paragraph by paragraph. I sort of did. And so in the ones</p> <p>9 where I'm saying, like, there's no way the cover memo was,</p> <p>10 well, something maybe internal to it was, and you just</p> <p>11 basically across the board claimed the privilege.</p> <p>12 MR. DRAYCOTT: We took, your Honor, no</p> <p>13 exaggeration here, hundreds and hundreds of attorney and</p> <p>14 paralegal time in trying to respond to directions that your</p> <p>15 Honor gave us on the 24th, and the thing that I would</p> <p>16 actually implore you to do is to let us file a response to</p> <p>17 the motion that has been filed with your Honor and --</p> <p>18 THE COURT: To this master thing.</p> <p>19 MR. DRAYCOTT: To the request. We just got it</p> <p>20 yesterday. We --</p> <p>21 THE COURT: Well, let me just say this: We need</p> <p>22 to move this forward. I, quite candidly, don't think</p> <p>23 anything is proving up at all that the government both knew</p> <p>24 and approved of what I have been calling the "mega spreads."</p> <p>25 They do support the 20 to 25 to 30 percent understanding,</p>	<p style="text-align: right;">21</p> <p>1 And, for example, one clarification I can offer you that</p> <p>2 relieved us of a lot of burden, you've heard mention of the</p> <p>3 forty-two documents that were submitted to Judge Bowler, but</p> <p>4 far and away, the bulk of those is prior drafts of final OIG</p> <p>5 reports. Now, when your Honor ruled on the 24th, she said</p> <p>6 you can just exclude those. If that principle were applied,</p> <p>7 for example, to the documents that are before Judge Bowler,</p> <p>8 it virtually -- I haven't looked at those in preparation for</p> <p>9 today, but my recollection is that that would remove a huge</p> <p>10 number of percentage of the documents that were submitted to</p> <p>11 Judge Bowler for in camera review.</p> <p>12 THE COURT: Well, why haven't you at least turned</p> <p>13 over to them --</p> <p>14 MR. DRAYCOTT: Oh, your Honor, that was -- as soon</p> <p>15 as we got your order, we forwarded it on to the Office of</p> <p>16 General Counsel for the CMS division. It was just a matter</p> <p>17 of advising the client agency. What I'm hoping your Honor</p> <p>18 recognized from the declarations that had been filed by the</p> <p>19 agency in support of this privilege assertion, it was a</p> <p>20 matter of enormous importance.</p> <p>21 THE COURT: But they didn't even go through them</p> <p>22 document by document of the twelve. I mean, it was sort of</p> <p>23 this -- it was an across-the-board thing.</p> <p>24 MR. DRAYCOTT: But, your Honor, again, just to</p> <p>25 answer your question, as soon as we got your order, we</p>

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1 conferred with the client agency. We wanted to make sure
2 that there was nothing further they wanted to require us --
3 there was nothing more that they would ask of us by way of
4 reconsideration. I confirmed as late as this morning that
5 that's not going to occur, and I advised Mr. Daly that we
6 would turn over the documents. But I think that was a
7 minimal delay, and it was for that purpose.

8 THE COURT: What I'm going to ask you to do, and I
9 mean this: Turn over everything that's relevant except
10 where it's core deliberative process and you care -- and you
11 care, that's the big thing, and you care -- because
12 otherwise the burden is overwhelming. If we're left with
13 forty documents, now that I've set up the basic standards, I
14 can go "thumbs up, thumbs down," and you don't have to do a
15 master. But if we're at -- how many documents did you say
16 we're at, 2,000 or something like that? -- I'm going to make
17 the government pay for the master because I can't do 2,000
18 documents. And, you know, you spent hours on this.

19 MR. DRAYCOTT: I assure you I did.

20 THE COURT: But, for example, there was a cover
21 memo or there was the memo from a carrier. That's not even
22 a prayer for those being --

23 MR. DRAYCOTT: Well, your Honor, with respect the
24 cover memo, in my defense, it really didn't present as part
25 of the same document, and the cover memo was just a couple

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1 of sentences, so that's how that got added. But --

2 THE COURT: But even in a lot of the memos, about
3 90 percent of them were just factual recitations. They
4 weren't deliberative. So, in fairness, it took me paragraph
5 by paragraph. I don't understand the lingo. I didn't
6 understand the abbreviations. I can't guarantee I got it
7 right. I can't. I mean, I just don't understand some of
8 it, so --

9 MR. DRAYCOTT: Well, your Honor, I guess if I can
10 respectfully get some clarification from your Honor then
11 with respect to the current state. I take it that we are at
12 the same time permitted to respond to the motion that was
13 filed. In the interim, we have direction from your Honor
14 with respect to some broad categories that we can both, you
15 know, take in and take out. We'll try to respond to that,
16 but at this point we can, I think -- I'm hoping that I
17 understand your Honor correctly that we can respond on both
18 fronts, that we can both go back and revisit our privilege
19 assertions, try to refine them, and look at them with the
20 guidance that we've received from your Honor today in mind,
21 but that we still may respond to the motion for a special
22 master?

23 THE COURT: Here's the problem. I remember being
24 a lawyer. We all remember. I'm sure you do this for
25 attorney-client privilege. You look at whether there's a

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1 plausible basis, and you assert it. Usually the first stab
2 through most attorneys overassert, and on the theory that,
3 well, we'll chisel back. My problem is that I have to
4 decide, A, if the privilege applies, and then, B, do a
5 weighing, okay. So I've got Part B, and I couldn't entrust
6 that to the government as a matter of law to just do the
7 weighing. That's something I think I have to do. And so
8 since government knowledge is both relevant to the various
9 issues we've talked about -- scienter, reliance, there's a
10 common law fraud claim, it's relevant to the government
11 knowledge defense -- they may go down in flames on it, but I
12 can't say they can't have the discovery.

13 MR. DRAYCOTT: No, no, and I've heard your Honor
14 today, and I heard your Honor back on the 24th, but I'm just
15 trying to make -- I'm trying to be clear in my own mind what
16 I need to do after today, and I take it that I still owe
17 your Honor a brief.

18 THE COURT: Do you have little stickies on the
19 ones you really care about of the 2,000? How many documents
20 did you say are subject to the deliberative privilege right
21 now?

22 MR. DRAYCOTT: Your Honor, we did throughout the
23 process of logging these documents also review them, and we
24 did attorney review on them, so I'm hard-pressed right now
25 to answer your question off the cuff. But we can certainly

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1 go back, take another cut through these documents and, you
2 know, try to refine the -- and talk about -- we're going to
3 need to talk about the issue with the client.

4 THE COURT: But I set a December 15 deadline, and
5 they're taking depositions, so -- and then do I want to
6 reopen them again? And so --

7 MR. DRAYCOTT: But, your Honor, I don't know that
8 appointment of a special master and giving it to a special
9 master would be --

10 THE COURT: Who's going to do this? Who's going
11 to do it?

12 MR. DRAYCOTT: A great amount of that is going to
13 fall to me, your Honor, and --

14 THE COURT: No, but I've got to no matter what.
15 You told me how many you thought there were.

16 MR. DALY: Well, from their privilege log alone,
17 Judge, we had 200, but there is, like, boxes of documents
18 that they never even logged. These documents from the
19 Legislative office, three of which you've ordered produced
20 to us, they've never even logged them. So the log is one
21 thing. We gave you a list of 200 we think ought to be
22 looked at. Perhaps counsel can look at those, decide which
23 one he wants to give us. Whatever is left we would put to a
24 special master. But there's a bunch of stuff, Judge, that
25 they never logged. They took the Office of Legislation and

<p style="text-align: right;">26</p> <p>1 in a broad sweep just said, "That's" all DPP. That's all</p> <p>2 deliberative process privilege." We don't even know what</p> <p>3 the particulars are, so --</p> <p>4 MR. DRAYCOTT: You Honor, can I get a</p> <p>5 clarification? I mean, again, in terms of the questions</p> <p>6 you've asked of me, I'm assuming that we're working within</p> <p>7 the parameters that your Honor set on July 24. There what</p> <p>8 you indicated for us to submit for in camera review are</p> <p>9 documents which showed the existence of the mega spreads for</p> <p>10 both infusions and inhalants.</p> <p>11 THE COURT: The kind of drugs that they</p> <p>12 manufacture, isn't that what they are?</p> <p>13 MR. MERKL: Yes, your Honor.</p> <p>14 MR. DALY: Vancomycin.</p> <p>15 MR. DRAYCOTT: The infusions, inhalants,</p> <p>16 vancomycin, and then your Honor also addressed the</p> <p>17 cross-subsidization issue, and then we were also talking</p> <p>18 about anything that related particularly to Abbott, Dey, or</p> <p>19 Roxane. So it's that, if I'm understanding --</p> <p>20 THE COURT: That sounds fair, yes.</p> <p>21 MR. DRAYCOTT: Now, we've essentially complied</p> <p>22 with the order and your Honor has done that work and has</p> <p>23 issued the order on what documents we have to turn over. I</p> <p>24 think what Mr. Daly is now alluding to is documents that</p> <p>25 were withheld that may relate to policy-making generally but</p>	<p style="text-align: right;">28</p> <p>1 the documents which show knowledge of the --</p> <p>2 THE COURT: Excuse me, you're not hearing me.</p> <p>3 First, you have to figure out, are they privileged? Does it</p> <p>4 even apply? Otherwise, shovel it over. Is it deliberative?</p> <p>5 Was it predecisional and deliberative? If it's not</p> <p>6 predecisional and deliberative, regardless of this other</p> <p>7 subcategory, it's got to be turned over, and it's got to be</p> <p>8 done page by page and paragraph by paragraph. If in fact it</p> <p>9 is predecisional and deliberative, that's when I've got to</p> <p>10 come into it: Well, what about the weighing? As a general</p> <p>11 category, I'm going to weigh it in their favor if it</p> <p>12 involves vancomycin, infusions and inhalants. If it doesn't</p> <p>13 involve those, I'm likely to weigh it your way.</p> <p>14 MR. DRAYCOTT: But what I'm saying, your Honor, is</p> <p>15 we've done that work and you've done that work now.</p> <p>16 THE COURT: Well, but for twelve, twelve sets of</p> <p>17 documents.</p> <p>18 MR. DRAYCOTT: Well, with respect to the category</p> <p>19 that you directed us to submit in camera on the 24th; that</p> <p>20 is, the documents that show knowledge of the mega spreads</p> <p>21 for infusions, inhalants, vancomycin, and for the documents</p> <p>22 that mention --</p> <p>23 THE COURT: Why didn't you disclose it to them</p> <p>24 then?</p> <p>25 MR. DRAYCOTT: Well, your Honor, again, this goes</p>
<p style="text-align: right;">27</p> <p>1 don't specifically reference a mega spread or an infusion</p> <p>2 drug or a -- and if we're talking about that, then there's</p> <p>3 very little more to do because the work has been done. So</p> <p>4 if we're staying within the parameters that your Honor set</p> <p>5 on July 24, then there's very little work to do, if any.</p> <p>6 THE COURT: Don't forget, don't forget, this is</p> <p>7 what I think -- I agree totally with the way you just</p> <p>8 described it, but they've got to be privileged to begin</p> <p>9 with. They've got to be deliberative or attorney-client,</p> <p>10 whatever, so they've got to be privileged to begin with. So</p> <p>11 it's not enough -- in other words, they may be relevant,</p> <p>12 broadly speaking, but not privileged. So on the privilege,</p> <p>13 when I did the weighing, anything that shows knowledge of</p> <p>14 that almost automatically I'm going to weigh in their favor.</p> <p>15 MR. DRAYCOTT: But, your Honor, what I'm saying</p> <p>16 is, what we've done is, we've complied with the direction</p> <p>17 that you gave us on the 24th.</p> <p>18 THE COURT: Some of the stuff just wasn't</p> <p>19 privileged. It didn't even get to Point A.</p> <p>20 MR. DRAYCOTT: Right, at which point -- and you've</p> <p>21 ordered it turned over, and it will be in their hands</p> <p>22 tomorrow.</p> <p>23 THE COURT: But the issue is, I haven't looked at</p> <p>24 the other 200.</p> <p>25 MR. DRAYCOTT: But if what you're asking for is</p>	<p style="text-align: right;">29</p> <p>1 back to, we conferred with the client agency, and they're</p> <p>2 going to be turned over tomorrow.</p> <p>3 THE COURT: No, but why did I have to go through</p> <p>4 the exercise of the in camera review?</p> <p>5 MR. DRAYCOTT: But, your Honor, my --</p> <p>6 THE COURT: You know what, are there 200 of them?</p> <p>7 Is that it?</p> <p>8 MR. DALY: 200 on the privilege log, Judge, yes.</p> <p>9 MR. DRAYCOTT: I'm not sure to which that --</p> <p>10 THE COURT: Why don't you give them to him?</p> <p>11 MR. DRAYCOTT: Which, the --</p> <p>12 THE COURT: The 200 --</p> <p>13 MR. DRAYCOTT: I'm not sure which --</p> <p>14 THE COURT: -- that you've asserted deliberative</p> <p>15 process privilege.</p> <p>16 MR. DRAYCOTT: I'm not sure to what group of</p> <p>17 documents Mr. Daly is making reference, which is why I'm</p> <p>18 having trouble, your Honor.</p> <p>19 MR. DALY: Your Honor, it's the motion that we</p> <p>20 filed. It's Schedule 1 to the motion. We selected 200 by</p> <p>21 number from your privilege log and said, "Judge, based on</p> <p>22 these titles, these ought to be looked at." We didn't even</p> <p>23 ask to do the whole privilege log, Judge.</p> <p>24 THE COURT: Well, what if I looked at -- maybe</p> <p>25 take every fifth one, and if I think there's a problem, I'll</p>

<p style="text-align: right;">30</p> <p>1 send it to a master?</p> <p>2 MR. DALY: We've got this other problem, Judge,</p> <p>3 that with respect to these documents that were not reviewed</p> <p>4 in response to your July 24 order, in their brief, Judge,</p> <p>5 they say that they looked at the log, the log was the</p> <p>6 parameter of what they looked at to determine what you</p> <p>7 wanted from your July 24 order. According to their own</p> <p>8 briefing, the rule-making files were not reviewed, the</p> <p>9 legislative files were not reviewed, and I cannot let --</p> <p>10 MR. DRAYCOTT: But that's what took the greatest</p> <p>11 bulk of the time was reviewing the rule-making support</p> <p>12 files. We were told they want them in detail to this in the</p> <p>13 document that was submitted --</p> <p>14 THE COURT: And it may well be that earlier drafts</p> <p>15 of rules and all that aren't going to qualify. I don't want</p> <p>16 to spend -- I'm going to take a look at -- you show him the</p> <p>17 200 documents. You give it to me, and if I think it's a</p> <p>18 mess, I'm going to appoint a special master. Who do we</p> <p>19 want? We're getting to December 15. I can't wait. It's</p> <p>20 Thanksgiving. You all have families. I can't have you</p> <p>21 working over Thanksgiving. I'm not bucking the December 15</p> <p>22 date. We're moving.</p> <p>23 MR. DALY: Judge, we'll take anybody that your</p> <p>24 Honor has a confidence and faith in that you've worked with</p> <p>25 before. We're happy with whatever your Honor chooses.</p>	<p style="text-align: right;">32</p> <p>1 MR. HENDERSON: Well, it depends whether you're</p> <p>2 going to narrow the categories to the ones, the categories,</p> <p>3 the ones that were addressed at the last hearing and which</p> <p>4 Mr. Draycott just described, or now you're expanding them to</p> <p>5 the entire universe.</p> <p>6 THE COURT: I just want you to turn them over</p> <p>7 because I don't want to do this. Okay, that's what I really</p> <p>8 want. But you're not willing to do that, okay? Because I</p> <p>9 hate doing it. More than life itself, I hate going through</p> <p>10 these documents. I hate it. So if I've got to, I will. So</p> <p>11 the reality is, the basic thing I want to say is, if you</p> <p>12 don't care, turn them over. It's only where you really</p> <p>13 care --</p> <p>14 MR. DRAYCOTT: Your Honor, the one thing that I</p> <p>15 would ask you to understand -- and, believe me, your Honor,</p> <p>16 as much time as you spent, I guarantee you I was hour for</p> <p>17 hour doing it with you. But we do have a client agency</p> <p>18 whose interests we are representing here, and so while</p> <p>19 you're saying, you know, "Do you care?" there's two levels</p> <p>20 of which you're speaking to me: one, as an attorney for the</p> <p>21 Department of Justice, and then -- but also I have CMS as a</p> <p>22 client, and it is CMS that has asserted that privilege.</p> <p>23 THE COURT: Well, then let their attorneys do it.</p> <p>24 MR. DRAYCOTT: And we're certainly going to bring</p> <p>25 them in, and we will consult with them. But I will get back</p>
<p style="text-align: right;">31</p> <p>1 MR. DRAYCOTT: Your Honor, I need to confer with</p> <p>2 Mr. Henderson and Ms. Smith.</p> <p>3 THE COURT: I'm thinking some retired Superior</p> <p>4 Court judge.</p> <p>5 MR. HENDERSON: Judge, I don't think that it's</p> <p>6 going to affect the discovery, the deposition schedule.</p> <p>7 These depositions -- there are no depositions that are</p> <p>8 pending.</p> <p>9 THE COURT: I'm just simply saying, I need to get</p> <p>10 some closure on this. I need to move on. I understand how</p> <p>11 the government works very well, and deliberative process</p> <p>12 privilege is a very difficult privilege because it</p> <p>13 requires -- you're going to weigh it differently than I am.</p> <p>14 So I went through just as a sample. I deliberately didn't</p> <p>15 refer it to a magistrate judge because they care so much,</p> <p>16 they've been sort of over the top on this, so I thought,</p> <p>17 "All right, I'll look." And sometimes I agreed, sometimes I</p> <p>18 disagreed, sometimes I partially agreed and partially</p> <p>19 disagreed. Everyone's going to call this differently. I'm</p> <p>20 not saying this is bad faith. I am simply saying I have not</p> <p>21 got the resources to go through a gazillion documents and</p> <p>22 write up a memo like I did on this on every single one. I</p> <p>23 can't. So we can either go to a master, or I can spot-check</p> <p>24 a few of them, and if I think that there's a problem, then</p> <p>25 I'll appoint a master.</p>	<p style="text-align: right;">33</p> <p>1 to the issue that Mr. Henderson just raised, which is, in</p> <p>2 order for me to go forward, I need to be very clear if we're</p> <p>3 on the same criteria that your Honor established back on the</p> <p>4 24th, which is the mega spreads for the infusions,</p> <p>5 inhalants, the vancomycin, the cross-subsidization. If</p> <p>6 that's what you're asking us to corral, we did a tremendous</p> <p>7 amount of work in advance of the submission that we filed to</p> <p>8 you and which you've now ruled upon, and what's left to do</p> <p>9 is not going to be burdensome, if at all, because that's the</p> <p>10 criteria we're looking for, those documents within that</p> <p>11 criteria that we're going to be looking at.</p> <p>12 THE COURT: Those criteria were the ones where I</p> <p>13 said I thought the deliberative process privilege would be</p> <p>14 outweighed by the defendants' needs, but you have to make</p> <p>15 the threshold decision first about whether they're</p> <p>16 deliberative and predecisional. In other words, there might</p> <p>17 be tons of other documents that you need to produce that</p> <p>18 don't fall in that category but aren't protected by the</p> <p>19 deliberative process privilege.</p> <p>20 MR. DRAYCOTT: One moment, your Honor. If I</p> <p>21 can --</p> <p>22 THE COURT: Do you understand what I'm saying?</p> <p>23 MR. HENDERSON: Now I get it, now I get it. Okay.</p> <p>24 MR. REALE: Your Honor, I'd like to raise one</p> <p>25 additional issue, if I may, and that is that they are</p>

<p style="text-align: right;">34</p> <p>1 seeking recovery on behalf of their expenditures to the</p> <p>2 Medicaid programs to all fifty states. And here we are in</p> <p>3 November, and we've asked for it, and they've agreed to</p> <p>4 produce claims data from all fifty states; but for Roxane,</p> <p>5 we still haven't received complete claims data from nineteen</p> <p>6 states, and we still haven't received MAC data from</p> <p>7 thirty-eight states.</p> <p>8 THE COURT: When is that going to be produced?</p> <p>9 MR. MERK: Dey as well, your Honor.</p> <p>10 THE COURT: When is all that going to be produced?</p> <p>11 MR. HENDERSON: We've produced what we've got.</p> <p>12 There are going to be a lot of states where -- there are two</p> <p>13 categories -- let me -- I have to back up so you'll</p> <p>14 understand.</p> <p>15 THE COURT: I don't know why this is all happening</p> <p>16 a month before the deadline after four years on both sides,</p> <p>17 why Roxane did a dump and why you haven't done a dump yet.</p> <p>18 MR. HENDERSON: Well, we can't produce what we</p> <p>19 don't have, your Honor.</p> <p>20 THE COURT: Excuse me. You should have produced</p> <p>21 it. It shouldn't have happened last week, okay? I know</p> <p>22 we've been dithering with Roxane for a while now. It should</p> <p>23 have been produced. But now let's go to your issue.</p> <p>24 MR. HENDERSON: On the claims data, your Honor, we</p> <p>25 can't produce what we don't have. There are many states</p>	<p style="text-align: right;">36</p> <p>1 don't produce it, they've got a problem, but I have no</p> <p>2 idea -- I see he's going like this and like this. I don't</p> <p>3 know whether it's dispositive or not. I don't know. I</p> <p>4 don't understand it, so I'll get to that at summary</p> <p>5 judgment.</p> <p>6 So this is what we're going to end up doing on</p> <p>7 this, okay, this is what we're doing: The discovery</p> <p>8 deadline is still December 15. I agree with you that it</p> <p>9 is -- we will have enough on our plate so that if in fact</p> <p>10 you can piggyback on these other states, I don't see the</p> <p>11 need for both sides to be spending this kind of money on</p> <p>12 them. At some point, if they're too slow, I will leave it</p> <p>13 up to the parties to let me know that it's too slow, and I</p> <p>14 will have to let you do these seven other states. You know,</p> <p>15 I'm not going to wait.</p> <p>16 MR. MERKL: I understand.</p> <p>17 THE COURT: But I think we have enough to do. We</p> <p>18 will go with the other states. The December 15 deadline for</p> <p>19 the other states is on. We're going to stick with the</p> <p>20 expert discovery schedule, et cetera.</p> <p>21 With respect to the deliberative process</p> <p>22 privilege, you're going to give me the 200 documents he's</p> <p>23 talking about, and then I'm going to take a look, and then</p> <p>24 I'm going to appoint a master if I think that it's just</p> <p>25 going to be too time-consuming. My guess is from my review</p>
<p style="text-align: right;">35</p> <p>1 where we do not have claims data that we've obtained from</p> <p>2 the states. What we have is a different level. There is a</p> <p>3 top level that CMS does obtain on a routine basis that is on</p> <p>4 a Web site. It's always been available to the defendants.</p> <p>5 They've got it. They've had it for a long time.</p> <p>6 There is another level of claims data that we have</p> <p>7 obtained from the states. We've produced that. They've had</p> <p>8 it for a long time, with the exception that in the last</p> <p>9 month or so there may be one or two states where we just</p> <p>10 recently got something. We have to process it. We'll</p> <p>11 produce it as soon as we can. Then there are a whole mess</p> <p>12 of other states where we don't have any data other than that</p> <p>13 top level that they've already got. That's what Mr. Reale</p> <p>14 is talking about is this data that we haven't collected, and</p> <p>15 we're going to have to make our case without it, your Honor,</p> <p>16 but we don't have it. The states haven't produced it.</p> <p>17 THE COURT: If they don't have it, they don't have</p> <p>18 it, which means they may lose on those claims because I</p> <p>19 can't create something out of nothing.</p> <p>20 MR. REALE: Your Honor, they have to drop those</p> <p>21 claims if they don't have it.</p> <p>22 THE COURT: You know what, I'm not doing that</p> <p>23 right here.</p> <p>24 MR. REALE: I understand that, but --</p> <p>25 THE COURT: This is about discovery. If they</p>	<p style="text-align: right;">37</p> <p>1 of the twelve sets of documents you gave me, it took -- I</p> <p>2 would not be able to do 200, and I called Judge Bowler, and</p> <p>3 she doesn't have the time either. You need to go down to</p> <p>4 Judge Bowler and see her and get a ruling because I am not</p> <p>5 reopening the December 15 deadline. Now, if she makes</p> <p>6 certain rulings that need by force to come in afterwards,</p> <p>7 that's a different story, but I'm not generally extending</p> <p>8 that deadline.</p> <p>9 MR. DRAYCOTT: Two points of clarification, and</p> <p>10 thank you, your Honor, and I do have, I think, a clearer</p> <p>11 understanding. But, one, with respect to the 200 documents,</p> <p>12 I take it that you would have us go back, rereview those.</p> <p>13 You don't want the 200 right away, but just turn over to you</p> <p>14 any which we propose to continue to withhold from</p> <p>15 defendants. Is that right?</p> <p>16 THE COURT: When can you do that? How about --</p> <p>17 today is Thursday -- how about next week? Is next week</p> <p>18 Thanksgiving?</p> <p>19 MR. MERKL: The week after, your Honor.</p> <p>20 MR. DRAYCOTT: Your Honor, knowing how long and</p> <p>21 how much work went into the last submission to you, I would</p> <p>22 like to take some more time. I will try to do it with all</p> <p>23 deliberative speed.</p> <p>24 THE COURT: It might be quicker to have me do it,</p> <p>25 like, "yes, no, yes, no."</p>

<p style="text-align: right;">38</p> <p>1 MR. DRAYCOTT: But I would like to -- we will,</p> <p>2 your Honor, try to glean this down to the ones that, again,</p> <p>3 which you -- you asked me if there were ones that have a tab</p> <p>4 on it of being of special importance, and I've indicated</p> <p>5 that that hasn't been done yet, but it's the first thing I'm</p> <p>6 going to do. I only got Mr. Daly's -- sorry -- the Abbott,</p> <p>7 the joint submission yesterday. I really barely had time to</p> <p>8 look at it before today. We'll go back to the 200</p> <p>9 documents. We'll look very closely at them, and then we</p> <p>10 will submit to you any which we're not going to turn over.</p> <p>11 And we'll go back to the agency and ask them whether or not</p> <p>12 they're willing to --</p> <p>13 THE COURT: I know, but how long is this going to</p> <p>14 take? We have December 15, and I can't --</p> <p>15 MR. DRAYCOTT: Your Honor, I'm going to start the</p> <p>16 process tomorrow.</p> <p>17 THE COURT: Because it took you three months last</p> <p>18 time.</p> <p>19 MR. DRAYCOTT: I will endeavor --</p> <p>20 THE COURT: And I'm not for a minute saying you</p> <p>21 didn't work hard. If anything, I pity you right now</p> <p>22 because, I mean, it's like going back and re-eating food you</p> <p>23 didn't like the first time around.</p> <p>24 MR. DRAYCOTT: The pity doesn't seem to be getting</p> <p>25 me too far today, but I will endeavor to do this by a week</p>	<p style="text-align: right;">40</p> <p>1 easier for me. I think it also makes it easier for</p> <p>2 Judge Bowler with respect to the documents that are now --</p> <p>3 THE COURT: The drafts, as long as the final is</p> <p>4 produced.</p> <p>5 MR. DRAYCOTT: Absolutely.</p> <p>6 THE COURT: Yes, sure. And there was one other</p> <p>7 memo you gave me you said was just a draft, so it was hard</p> <p>8 for me to understand because you didn't give me a</p> <p>9 declaration that went document by document. At least I</p> <p>10 didn't find it.</p> <p>11 MR. DRAYCOTT: No, no, we were relying on prior</p> <p>12 declarations.</p> <p>13 THE COURT: But they were broad-sweeping, the end</p> <p>14 of the Republic if these are produced.</p> <p>15 MR. DRAYCOTT: Your Honor, thank you. I think</p> <p>16 I've got the clarification I need, and we will endeavor --</p> <p>17 THE COURT: Next week. And you saw what I</p> <p>18 excluded, I mean, the real back-and-forth: "I recommend</p> <p>19 that you do this policy thing for this reason," and the guy</p> <p>20 says "No." I mean, that's like core stuff, but 99 percent</p> <p>21 of it wasn't that.</p> <p>22 MR. DRAYCOTT: Your Honor, I gave your order a</p> <p>23 very careful reading and will continue to do so. Thank you.</p> <p>24 MR. HENDERSON: Just a couple of fine points, your</p> <p>25 Honor.</p>
<p style="text-align: right;">39</p> <p>1 from tomorrow.</p> <p>2 THE COURT: Fair enough, fair enough. And then</p> <p>3 I'll just do a quick "yes, no, yes, no." I can't begin to</p> <p>4 do it paragraph by paragraph the way I did the last time,</p> <p>5 but the reality is that it was -- I think what you did is,</p> <p>6 you saw a document; if there was something there that was</p> <p>7 deliberative, you withheld it. I think that the law doesn't</p> <p>8 let you do it so broadly.</p> <p>9 MR. DRAYCOTT: No, but the thing that we didn't do</p> <p>10 generally, your Honor, is we didn't go through redactions.</p> <p>11 Of course, we were never asked to do that, but we can also</p> <p>12 consider redactions at this point, which is --</p> <p>13 THE COURT: It will take you forever.</p> <p>14 MR. DRAYCOTT: Well, again, we'll try to get this</p> <p>15 done.</p> <p>16 THE COURT: Most of these documents were from the</p> <p>17 late 1990s. They're ten years old, right?</p> <p>18 MR. DRAYCOTT: Your Honor, believe me, I've heard</p> <p>19 everything that your Honor said today, the concerns that</p> <p>20 you've raised and the places where you think we're on firmer</p> <p>21 ground and less firm ground. Just to clarify, though, I</p> <p>22 take it the one thing -- the greatest bulk of the documents</p> <p>23 for which we have asserted privilege are drafts of OIG</p> <p>24 reports, and your Honor excluded that from the last time we</p> <p>25 were here. If that's still excluded, I think that makes it</p>	<p style="text-align: right;">41</p> <p>1 THE COURT: I'm sure they're fine.</p> <p>2 MR. HENDERSON: Well, yes. On the seven states</p> <p>3 that are going to go after December 15, am I correct in</p> <p>4 understanding it will be one 30(b)(6) and one 30(b)(1)</p> <p>5 deposition per state?</p> <p>6 MR. MERKL: Your Honor, what we propose to do is,</p> <p>7 we'll just cross-notice whatever they do. If they do three</p> <p>8 or four depositions in the state, we'll do three or four.</p> <p>9 The whole idea is to avoid having to go out and making them</p> <p>10 do this extra process.</p> <p>11 MR. HENDERSON: Some of these states have had</p> <p>12 dozens of depositions that just --</p> <p>13 THE COURT: I can't answer that in advance. I</p> <p>14 mean, my theory was on this that it would have some limits</p> <p>15 on it per state, but if somebody is already taking a</p> <p>16 deposition --</p> <p>17 MR. MERKL: Exactly, your Honor, these are</p> <p>18 happening anyway.</p> <p>19 THE COURT: What?</p> <p>20 MR. MERKL: These are all depositions that would</p> <p>21 be happening anyway.</p> <p>22 THE COURT: Yes, I know, but at some point it's a</p> <p>23 burden on the -- the litigating burden. It's whatever it</p> <p>24 was for these other states: one 30(b)(6), one 30(b)(1), you</p> <p>25 can cross-notice. Do you want to attend the rest and I</p>

<p style="text-align: right;">42</p> <p>1 would use the information? Sure. But I can't make the</p> <p>2 government attend all of these if there are eight per state.</p> <p>3 You can still use the materials, but you just won't --</p> <p>4 MR. MERKL: Be able to ask questions, but we can</p> <p>5 use the material.</p> <p>6 THE COURT: Yes, but you can use the material.</p> <p>7 MR. MERKL: Or we can ask questions of one and</p> <p>8 notice a 30(b)(6) of --</p> <p>9 THE COURT: Yes.</p> <p>10 MR. MERKL: Okay.</p> <p>11 THE COURT: But they can use the material. If</p> <p>12 it's out there under oath, it can be used.</p> <p>13 MR. HENDERSON: On summary judgment, I think</p> <p>14 anybody can use anything that's under oath basically.</p> <p>15 One other fine point, your Honor. The last time</p> <p>16 around, I think it was in the Abbott case, there were a</p> <p>17 couple of situations -- and I think I speak on behalf of all</p> <p>18 the parties here -- where a witness got sick or something</p> <p>19 and the deposition had to be postponed.</p> <p>20 THE COURT: Sure.</p> <p>21 MR. HENDERSON: And the question is, can we, if we</p> <p>22 all agree that a deposition has to be scheduled for that</p> <p>23 type of reason, can we do it ourselves without seeking leave</p> <p>24 of Court?</p> <p>25 THE COURT: Of course, of course.</p>	<p style="text-align: right;">44</p> <p>1 THE COURT: Right.</p> <p>2 MR. MERKL: What I don't understand is, is the</p> <p>3 government saying, for the seventeen states that we don't</p> <p>4 have the claims data for yet, we don't have it because it</p> <p>5 doesn't exist at the state level? Or is it some problem</p> <p>6 where they're having trouble getting it from the states</p> <p>7 where the onus is kind of now on me to go to these states</p> <p>8 and get it?</p> <p>9 THE COURT: Which is it, that it doesn't exist or</p> <p>10 the states won't give it to you?</p> <p>11 MR. HENDERSON: I think probably every state has</p> <p>12 claims data. They process claims. We have not had, quite</p> <p>13 frankly, the resources to go out and -- it's very</p> <p>14 time-consuming to collect this data, so we have not done it</p> <p>15 for all fifty states, and some states simply haven't</p> <p>16 produced it to us. So we just don't have it all, and we're</p> <p>17 unlikely to get much more. It's possible we could get</p> <p>18 another state or two before December 15, but --</p> <p>19 THE COURT: Do they understand they won't get</p> <p>20 their half if they don't do it?</p> <p>21 MR. HENDERSON: Your Honor, we're going to rely on</p> <p>22 the data, more summary data that is reported to CMS that's</p> <p>23 on the Web site. That's what's been done in the Abbott</p> <p>24 case, for example.</p> <p>25 THE COURT: And that may be enough or not. I just</p>
<p style="text-align: right;">43</p> <p>1 MR. HENDERSON: Thank you, because last time it</p> <p>2 took many months.</p> <p>3 THE COURT: If you all agree, I mostly agree. My</p> <p>4 biggest issue is that this case is getting very old, and</p> <p>5 short of the First Circuit just ending the entire case,</p> <p>6 we're all going to grow old together unless we get this</p> <p>7 moving, right? I mean, this case, I'm still getting new</p> <p>8 cases in it.</p> <p>9 MR. MERKL: Kansas.</p> <p>10 THE COURT: It's been seven years since I started,</p> <p>11 so we need to get some momentum on the case. Even if I just</p> <p>12 had five sample cases that could be briefed all the way</p> <p>13 through to give people a sense of how I might come down on</p> <p>14 these things. Maybe I could even divvy it up, and then you</p> <p>15 could go on appeal or something, just something, and then</p> <p>16 maybe have some serious -- have you started talking</p> <p>17 settlement?</p> <p>18 MR. HENDERSON: Yes, your Honor. In fact,</p> <p>19 Mr. Merkl --</p> <p>20 THE COURT: We need to go off the record for this.</p> <p>21 MR. MERKL: We can do that in a second. Can I</p> <p>22 just ask for clarification on the claims data? I</p> <p>23 understand, obviously, if the government doesn't have it, we</p> <p>24 won't get it, and the consequences of not having it, we'll</p> <p>25 litigate that later.</p>	<p style="text-align: right;">45</p> <p>1 don't understand it well enough.</p> <p>2 MR. HENDERSON: And the defendants will move to</p> <p>3 exclude our damages estimates to the extent that they rely</p> <p>4 on that high-level data, and the Court will have to decide,</p> <p>5 but we can't produce what we don't have.</p> <p>6 THE COURT: All right, that's where it is. I</p> <p>7 can't refine it any more.</p> <p>8 MR. MERKL: No, I understand, your Honor. I guess</p> <p>9 what I'm saying is, if it really exists, CMS can direct the</p> <p>10 states to give it to us. I understand the states may not</p> <p>11 want to do it, but they're claiming these states. The data</p> <p>12 we're talking about, your Honor, is the type of thing you're</p> <p>13 looking at in Massachusetts --</p> <p>14 THE COURT: I tell you what, if you want to</p> <p>15 subpoena it, subpoena it. They're stuck with whatever they</p> <p>16 produce.</p> <p>17 MR. HENDERSON: One final thing, your Honor. I</p> <p>18 think we should have a scheduling conference scheduled at</p> <p>19 some point, certainly both to talk about what the status is</p> <p>20 of these other seven states later on down the road, and also</p> <p>21 I think, too, when we get closer to summary judgment, to</p> <p>22 talk about how we're going to approach summary judgment. We</p> <p>23 don't have a game plan right now. We've had a little bit of</p> <p>24 discussion amongst us, but I think it's going to -- some</p> <p>25 months from now --</p>

<p style="text-align: right;">46</p> <p>1 THE COURT: What are you thinking of?</p> <p>2 MR. HENDERSON: January-February time period.</p> <p>3 THE COURT: I'm thinking you're going to have to</p> <p>4 brief it state by state, right?</p> <p>5 MR. MERKL: That's our view.</p> <p>6 MR. DALY: Not necessarily, Judge.</p> <p>7 MR. HENDERSON: I don't think we're going to have</p> <p>8 fifty summary judgment motions.</p> <p>9 THE COURT: I don't know enough. If Mylan is any</p> <p>10 indication, it's so sui generis.</p> <p>11 MR. HENDERSON: Well, there are going to be</p> <p>12 state-by-state issues, but, in any event, it just seems to</p> <p>13 me we may need a scheduling conference or a status</p> <p>14 conference. If your Honor doesn't want to do it, that's</p> <p>15 fine. It just seems to me --</p> <p>16 THE COURT: Let me put it this way: I had this</p> <p>17 and I thought this was very helpful today, and I thank you</p> <p>18 all for coming. I'm just simply saying, I don't know when</p> <p>19 to schedule it for. I don't have theoretical opposition,</p> <p>20 but I don't want to create problems. The way we have this</p> <p>21 now, you're going to be done with --</p> <p>22 MR. HENDERSON: How about after the close of</p> <p>23 expert discovery?</p> <p>24 THE COURT: Which is when?</p> <p>25 MR. HENDERSON: I've forgotten. Does anybody</p>	<p style="text-align: right;">48</p> <p>1 CERTIFICATE</p> <p>2</p> <p>3</p> <p>4 UNITED STATES DISTRICT COURT) DISTRICT OF MASSACHUSETTS) ss. CITY OF BOSTON)</p> <p>5</p> <p>6</p> <p>7 I, Lee A. Marzilli, Official Federal Court</p> <p>8 Reporter, do hereby certify that the foregoing transcript,</p> <p>9 Pages 1 through 47 inclusive, was recorded by me</p> <p>10 stenographically at the time and place aforesaid in Civil</p> <p>11 Action Nos. 07-12048, 06-11337, and 05-11084, In Re:</p> <p>12 Pharmaceutical Industry Average Wholesale Price Litigation,</p> <p>13 and thereafter by me reduced to typewriting and is a true</p> <p>14 and accurate record of the proceedings.</p> <p>15 In witness whereof I have hereunto set my hand</p> <p>16 this 19th day of November, 2008.</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21 /s/ Lee A. Marzilli</p> <p>22</p> <p>23 LEE A. MARZILLI, CRR</p> <p>24 OFFICIAL FEDERAL COURT REPORTER</p> <p>25</p>
<p style="text-align: right;">47</p> <p>1 know? The beginning of March maybe?</p> <p>2 MR. MERKL: March --</p> <p>3 THE COURT: Close of expert discovery, May 22?</p> <p>4 MR. MERKL: Yes, May 22, your Honor. Close of</p> <p>5 expert for the Abbott, Dey, and Roxane cases, May 22, 2009.</p> <p>6 THE COURT: Robert, why don't we give them a date</p> <p>7 in May, and it's without prejudice to anyone asking to come</p> <p>8 in sooner, if that's necessary, because this was useful</p> <p>9 today. When should we do this in May?</p> <p>10 THE CLERK: May 28 at 2:00 p.m.</p> <p>11 MR. MERKL: Is that Memorial Day?</p> <p>12 THE CLERK: The Thursday of Memorial Day week.</p> <p>13 THE COURT: Now let's go off the record.</p> <p>14 (Discussion off the record.)</p> <p>15 (Adjourned, 4:45 p.m.)</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	